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No. 06-766

IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,
Petitioners,

v.

MARGARITA LOPEZ TORRES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICI CURIAE* OF THOMAS MANN, NORMAN ORNSTEIN, THE REFORM INSTITUTE AND CAMPAIGN LEGAL CENTER IN SUPPORT OF REPONDENTS

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STATEMENT OF INTEREST[1]

This *amici curiae* brief in support of Respondents is filed on behalf of political scientists Thomas Mann and Norman Ornstein, and the Reform Institute and the Campaign Legal Center, both nonprofit, nonpartisan organizations.

These *amici* have for many years studied campaign finance and voting rights issues arising in judicial, legislative, and executive branch elections on the state and federal level. Descriptions of the *amici* are included in Appendix A to this brief.

The present case concerns a challenge brought under the First and Fourteenth Amendments of the Constitution to certain provisions of New York Election Law governing New York's convention system for nominating candidates for the office of Justice of the New York State Supreme Court. The case raises important questions about the normative goals of the judicial selection process, the authority of the state to regulate the activities of political parties, and the scope of First Amendment protection for party members' participation in party nominations. *Amici* have a longstanding, demonstrated interest in the integrity of elections and the protection of citizens' right to vote and to participate in the political process, and these interests are directly impacted in this litigation.

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[1] The parties, with the exception of Petitioner New York County Democratic Committee and Statutory Intervenor the Attorney General of the State of New York, have filed letters with the Court consenting to all *amicus* briefs. Written consent from the remaining parties has been filed with the Court along with this brief. No counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Because New York has "cho[sen] to tap the energy and legitimatizing power of the democratic process" by requiring the election of its state trial court justices, it must "accord the participants in that process the First Amendment rights that attach to their roles." *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002). This principle holds as much for the nomination stage – an "integral part of the election machinery" – as it does for the general election that follows. *United States v. Classic*, 313 U.S. 299, 318 (1941). New York voters are thus entitled to the meaningful exercise of their First Amendment rights as much in the nomination of judicial candidates as in their eventual election.

New York's statutory scheme of judicial nominating conventions makes a mockery of this constitutional principle. As documented in exhaustive detail by the courts below, these conventions are simply a "rubber stamp" for the preferences of party bosses. The New York convention scheme fences out any candidate lacking the support of party leadership, divests rank-and-file party members of their voting and associational rights, and thereby "arrogates to [party leaders] a choice that belongs to the people." Pet. App. 5.[2]

New York's unique primary scheme also undermines the twin aims of any legitimate judicial selection process: maintaining judicial accountability and independence. Although the primary scheme allows party voters to cast a vote, that vote can only ratify the choices of local party leaders. Since party leaders, not the rank-and-file, effectively choose the party candidates and thus usually the winner in the subsequent general election, would-be Supreme Court Justices will follow the interests of party bosses, not party members. Likewise, although New York's primary scheme

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[2] "Pet. App. __" refers to the opinions of the Second Circuit (Pet. App. 1-92) and district court (Pet. App. 93-185) in the Petition Appendix.

may ensure that Supreme Court Justices are independent of public opinion, it makes them completely dependent on local party leaders, a group that represents neither the party voters nor the general citizenry. As a result, Supreme Court judgeships and many below them in the New York judicial hierarchy have become objects of local party patronage, where party bosses not only control who becomes a judge but also feel free to demand whom judges hire in their most important and sensitive positions.

In light of the constitutional burdens imposed by the New York statute at issue here – and its diminishment of the judiciary's accountability and independence – *amici* concur with the Second Circuit that strict scrutiny should apply to its review. As expressed by the Second Circuit, the First Amendment affords voters and candidates a "realistic opportunity to participate in the nominating process," free from "burdens that are both severe and unnecessary to further a compelling state interest." Pet. App. 44.

Although providing the party rank-and-file with the mere "opportunity to participate" in their own party's nomination process would seem basic to their First Amendment right to associate, Petitioners herein assert that the Second Circuit decision pronounces a "broad and novel" constitutional standard. Reply to Brief in Opposition to Petition ("Cert. Reply") at 2. Petitioners further claim that the "unprecedented" decision spells the end for 34 state statutes which provide for some variety of nominating convention, as well as for the presidential nominating convention. *See* Brief for Petitioners New York County Democratic Committee, *et al.* ("Petitioners' Br.") at 11-12; Brief for Petitioner Attorney General of the State of New York ("NY-AG Br.") at 23-24.

This is hyperbole, and should be rejected as such. *Amici* respectfully submit this brief to refute Petitioners' contention that the decision below "pose[s] a threat to the process by

which political parties select their candidates nationwide and to basic principles of representative democracy." Petition for Writ of Certiorari ("Cert. Pet.") at 3. The Second Circuit decision does not implicate the 34 state convention statutes cited by Petitioners for the simple reason that the New York system is unique, and has no parallel in another state or jurisdiction. Indeed, given how New York's judicial nominating system undercuts the accountability and independence of its Supreme Court judiciary, it is not surprising that the New York system has been adopted by no other state. Similarly, the *Lopez Torres* case has no bearing on the presidential nominating convention, which, unlike the New York statutory system, is national in scope and effect, based predominantly on party rule, and more accessible and open to voter participation.

In sum, reports of the convention system's death are greatly exaggerated. The Second Circuit's decision is a limited, fact-bound ruling and will have no repercussions for the electoral systems of the many states, for the presidential nomination process, or for the use of conventions generally. Its only effect will be on New York itself: by restoring to the voters some measure of their right to associate freely with their party of choice; and by releasing the Supreme Court judiciary from the vise grip of political party leadership.

ARGUMENT

I. NEW YORK'S SCHEME FOR NOMINATING CANDIDATES IN SUPREME COURT ELECTIONS UNDERMINES THE TWIN GOALS OF JUDICIAL INDEPENDENCE AND ACCOUNTABILITY.

American judicial selection processes serve two complementary aims: judicial independence and accountability. The federal system, for example, pursues largely the first. Neither the President, Congress, nor the

people themselves can dismiss a judge for an unpopular decision or even reduce that judge's salary. U.S. Const. art. III, § 1. But judicial independence is not absolute. The Senate must confirm judges the President nominates, U.S. Const. art. II, § 2, cl. 2; anyone may criticize a judge, *Konigsberg v. State Bar*, 353 U.S. 252, 269 (1957) ("Citizens have a right under our constitutional system to criticize government officials and agencies. Courts are not, and should not be, immune to such criticism."); *Bridges v. California*, 314 U.S. 252, 270 (1941) (same); and the Senate can remove a judge through impeachment for "high Crimes and Misdemeanors," U.S. Const. art. II, § 4. Thus, although federal judges enjoy a high degree of job protection, which insulates their decisionmaking from influence by political actors and public opinion, even they must abide some limits and are accountable through reputation and criticism to the citizenry.

Some state systems, on the other hand, pursue largely the second aim. They elect their judges and subject them to regular reelection. *See* American Judicature Society, *Judicial Selection In The States, Appellate and General Jurisdiction Courts, Initial Selection, Retention, and Term Length*, Jan. 2004 [hereinafter *AJS Data*] (listing Alabama, Arkansas, Georgia, Idaho, Illinois, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Washington, West Virginia, and Wisconsin as examples).[3] In these systems, since the judge's job depends on the favor of the public, the judge can be counted on to exercise judicial power with the public's view somewhere in mind. Like the federal system, however, these state systems do not pursue their primary goal single-mindedly. Although these judges must face election, they usually have to do so less often than do legislative and executive officers. *See* Roy A. Schotland,

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[3] Available at http://www.ajs.org/js/SelectionRetentionTerms.pdf (last visited July 5, 2007).

To The Endangered Species List, Add: Nonpartisan Judicial Elections, 39 Willamette L. Rev. 1397, 1400 & n.17 (2003); Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 Sw. L. Rev. 31, 51 (1986). And, once elected, they often face a unique type of reelection process, the retention election, which insulates them somewhat from popular opinion. *See* David B. Rottman & Roy A. Schotland, *What Makes Judicial Elections Unique?*, 34 Loy. L.A. L. Rev. 1369, 1371 (2001) (arguing that although a retention election provides "electoral accountability for . . . judges, it seeks to balance that accountability with protection for judicial independence"). Other state systems fall somewhere in between these primarily appointive or elective systems. They may provide for initial appointment of their judges subject to occasional retention elections, *see AJS Data* (listing Alaska, Colorado, Iowa, Nebraska, Utah, and Wyoming as examples), or provide for the appointment of some judges and the election of others, *see id.* (listing California, Florida, Indiana, Missouri, New York, Oklahoma, South Dakota, and Tennessee as examples).

Although different systems pursue the goals of independence and accountability in different ways and to different degrees, nearly all respect the importance of each. As Rodney French argued in the Massachusetts constitutional convention considering judicial elections: "I like to have independent and upright men in all public stations, but I do not like the idea of having any public officers entirely independent of the people. I think they should be so dependent at least, as to have an eye to the power they serve." 2 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLIED MAY 4TH, 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 785 (Boston 1853). Similarly, Henry Thornton, a delegate to the Indiana Constitutional Convention of 1850, expressed the same need

to pursue both goals: "I do not say that [the judge] should be so much under [the people's] influence as to be awed into decisions, but merely that he should understand their will." 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA, 1850, at 1662 (Indianapolis 1850). Judges must possess independence if only to ensure that the other branches of government encroach neither on one another nor on the people and must remain accountable to some degree lest they themselves reach beyond their proper sphere.

Amici do not argue here that one particular type of judicial selection system best combines independence and accountability. Reasonable people may accommodate these goals differently and different systems may be better suited to different political cultures. *Amici* do believe, however, that New York's unique system for selecting state Supreme Court Justices turns both these objectives on their head. Instead of accommodating accountability and independence in some way, as other systems do, it paradoxically undermines both goals at the same time. By design, it denies voters any real power to hold judges accountable *and* denies judges independence from political actors. By effectively lodging the power to control the nomination of state Supreme Court Justices in local political party leaders, New York's mandated system makes state Supreme Court Justices—and many below them on the judicial ladder—beholden to local party officials. The judges, their law clerks, and other judicial employees become mere patronage spoils.

A. New York's Scheme Makes Supreme Court Justices Unaccountable to Voters.

New York's state-mandated primary system undermines judicial accountability in several mutually reinforcing ways. First, it denies the public any way to replace judges who consistently mistake the judgments of the people's

representatives or otherwise fail to respect the law and the values it embodies. Under the New York system, local party officials enjoy unfettered power to choose and control the slates of convention delegates who later nominate the party's Supreme Court candidates. As the district court and court of appeals found, others, particularly party rank-and-file voters, have no real power to nominate delegates or to persuade those delegates chosen by local leaders to go against the local leaders' wishes. Pet. App. 31-32, 45-46. Under these conditions, an aspiring judge will curry the favor of local party bosses and be unconcerned about what the voters themselves think. So long as the aspirant enjoys the bosses' support, he will face no primary opposition and thus need not fear the voters' judgment. No matter how much voters loathe him, he knows he will be nominated since local party leaders will ensure he has no intraparty competition. The most voters can do to register unhappiness with the judge's past actions is stay home. But so long as the judge votes for himself he will win. As in the former Soviet Union, where voters had a "choice" of a single candidate picked by the ruling Communist Party, *see* Theodore Shabad, *Soviet to Begin Multi-Candidate Election Experiment in June*, N.Y. Times, Apr. 15, 1987, at A6, voters in New York's Supreme Court primary enjoy all of democracy's ceremonies without any of its substance.

Second, without intraparty competition, judges have no political incentive to internalize the values of the voters they serve. A judge who fears that others might run against her in the future will feel some need to consult, if not follow, the voters' values. *See* Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs For Office?*, 48 Am. J. Pol. Sci. 247 (2004) (offering empirical evidence that elected judges' values in sentencing align more closely to the public's as they approach reelection). If the election is a mere formality, on the other hand, she will not. She will instead feel the need not to

offend those who have real power over her future ballot prospects: the local party leaders. She will curry favor with them, not with the people; internalize, to some degree, their way of thinking, not the public's; and respond to their wishes, not her constituents'. The New York election system perverts the values that led to its adoption by making Supreme Court Justices accountable to their party patrons, not to the public.

Third, a system, like New York's, that denies voters any real say deadens voter interest and attention in Supreme Court elections and undercuts any legitimacy the election could confer on the judiciary. As social scientists have noted, the more competitive an election, including a judicial election, the more people interest themselves in it, follow its turns and arguments, and vote. L. MILBRATH, POLITICAL PARTICIPATION: HOW AND WHY PEOPLE GET INVOLVED IN POLITICS 101-02 (1965); Kenneth N. Griffin & Michael J. Horan, *Merit Retention Elections: What Influences the Voters?*, 63 Judicature 78, 85-86 (1979); Nicholas P. Lovrich & Charles H. Sheldon, *Voters in Contested, Nonpartisan Judicial Elections: A Responsible Electorate or a Problematic Public?*, 36 W. Pol. Q. 241, 247-48 (1983); Nicholas P. Lovrich & Charles H. Sheldon, *Voters in Judicial Elections: An Attentive Public or an Uninformed Electorate?*, 9 Just. Sys. J. 23, 32-35 (1984); Charles H. Sheldon & Nicholas P. Lovrich, *Knowledge and Judicial Voting: The Oregon and Washington Experience*, 67 Judicature 235, 238-39 (1983). The more engaged and informed the electorate, the more accountable the candidates and the more people will believe that their judges reflect them in important ways. The judges will enjoy a greater trust, their decisions will command more respect, and they will earn for the courts the legitimacy on which the law depends. If people feel, however, that their vote can at most ratify a local party boss's choice of judge, they are likely to see the judiciary as unaccountable, unqualified, and untrustworthy and eventually come to view its decisions as illegitimate.

In New York, moreover, interparty competition in the general election cannot overcome this accountability deficit. For one thing, as the Second Circuit recognized, "because one-party rule is the norm in most judicial districts, the general election is little more than ceremony." Pet. App. 23. From 1990 through 2002, about half of New York's elections for Supreme Court Justice were entirely uncontested. *Id.* Only one party's candidate—nominated through a process that marginalized the party's own rank-and-file voters—appeared on the ballot. In judicial districts dominated by a single party, in fact, interparty competition was virtually non-existent through this whole period. During this time, 91 percent of Supreme Court elections in the Sixth Judicial District (Republican) were unopposed; in the First (Democratic), 85 percent were. *Id.* And, as the district court noted, "[i]n districts that are not dominated by a single party, the Democratic Party and the Republican Party essentially divvy up the judgeships through cross-endorsements." *Id.* at 130 & n. 26. Rather than compete for these judicial offices, which would provide some voter choice, the two major parties prefer to split the rights to designate individual judges and so divide the resulting patronage spoils. Many, if not most, of the remaining elections were similarly "ceremon[ial]." *Id.* at 23. Although they were nominally contested, they were not competitive. *Id.* at 130-31. Using a standard yardstick from political science, only two percent of Supreme Court general elections in New York City during this period could be said to be competitive at all. *Id.* at 130.

B. New York's State-Mandated Nominating System Also Undermines the Goal of Judicial Independence.

By allowing local party leaders to handpick and control the delegates who choose the party's Supreme Court nominees, New York's nomination process makes judicial

candidates beholden to those leaders. As Petitioners' own expert witness, New York City Board of Elections Commissioner Douglas Kellner, testified, the New York system is "designed" to suppress all candidacies other than those approved by party leaders. Despite the fact that the primary process advertises itself as open, nominally permits would-be candidates to run slates of delegates, allows party members to vote for delegates, and has those delegates choose the party's nominee, "the idea that an individual candidate would go out and recruit delegate candidates and run delegates pledged to that candidate in the primary is not the system and it twists the *design* of the system on its head." *Id.* at 17 (emphasis added). "By definition," Kellner added, "the convention system is *designed* [so] that the political leadership of the party is going to designate the party's candidates. Specifically, judicial delegates are part of the party leadership and responsive to it and make it up, you know, constitute the party leadership." *Id.* at 19 (emphasis added). New York has not merely implemented a nomination system that has the unavoidable effect of lodging control over Supreme Court candidates in local party bosses; it has designed one for that very purpose. Because the district leaders, who chose the convention delegates, are so closely affiliated with the county party chairs, the county chairs can effectively dictate whom the convention picks. As Henry Berger, the former Chairman of New York's Commission on Judicial Conduct as well as a former district leader and judicial delegate, put it, "In my experience, the district leaders almost always follow the wishes of the county party chairperson when it comes to voting for Supreme Court candidates at the convention. In turn, the delegates follow the wishes of the district leaders who have selected them and support the county chairperson's chosen candidates." *Id.* Although the New York scheme relies on the informal network of relationships that defines the local party hierarchy, that network works so effectively that Berger testified that in the Second and Twelfth Judicial Districts party officials had

told him the names of the party's Supreme Court nominees not only before the conventions had met, but even before the primary elections had taken place at which the voters would choose the delegates to send to those conventions. *Id.* The primary election, like the convention itself, is a ceremonial step to wrap the choice of local party leaders in the mantle of democratic legitimacy.

So much control does the nomination process give them over the overall election that local party leaders view judgeships as their dependencies and reliable sources of patronage. Judge Lopez Torres's experience serves as an illustration. Backed by the Kings County Democratic Committee, Lopez Torres was elected a Brooklyn Civil Court judge in 1997. Soon thereafter, the county party leader and the district party leader directed her to hire a particular person as her law clerk. She interviewed the man and contacted his former employer, a Brooklyn Supreme Court Justice, who described the man's work as "mediocre" and said that "he had spent an enormous amount of time on the phone doing political work." *Id.* at 24-25. Lopez Torres then hired someone else to help her research and draft her opinions.

Both the county and the district leader confronted her. The county leader demanded that she fire the person she had hired on the merits and hire the person he himself had recommended instead. These people "work hard for the Democratic Party's political clubs to get candidates elected [and the] job is a way to reward them," he explained. *Id.* at 25. He held out party leaders' control of the nomination process as a way to discipline her. Some day, he warned, she "would want to become a Supreme Court Justice and . . . the party leaders would not forget this." *Id.* "[W]ithout the 'County's' support," he told her, her Supreme Court nomination "will not happen." *Id.*

The district leader similarly demanded that Lopez Torres "make it right" by "hiring the person referred by 'County,'" but she still refused. *Id.* Later he offered her a second chance at redemption. If she would only hire his daughter as her law clerk, he would see to it that the Democratic Party would nominate her for a Supreme Court justiceship. *Id.* Again she declined.

Over the next several years, Lopez Torres repeatedly sought the Democratic Party's nomination for Supreme Court Justice. Each time the local party rebuffed her because of her "disloyal[ty]" in refusing to hire unqualified party workers or children of party bosses as law clerks. *Id.* at 27. One district leader extolled her as "highly qualified" yet voted against her nomination because she was "an ingrate" who "courted [the original district leader] who supported her for Civil Court, but then decided she didn't need him anymore and denied his daughter a job." *Id.* at 28. During this period, however, Lopez Torres clearly demonstrated that she had enough popular support—within and outside the party—to carry the day among the voters. When she ran for reelection as a Civil Court Judge, the local Democratic Party leaders fielded a primary candidate against her. She won in the primary and then received over 200,000 votes in the general election—more than any Democratic candidate for Supreme Court Justice in Kings County received that year. *Id.* at 27. Her Supreme Court candidacies failed not because she lacked voter support but only because local party leaders controlled whom the voters could vote for. Their support, not the voters', dictated who would become a Supreme Court Justice.

As Judge Lopez Torres's example shows, local party control over the primary process threatens to completely upend judicial independence. These party leaders were so confident of their power to discipline judges that they believed they could demand that a judge hire unqualified applicants or a party boss's child for the judge's most

important and sensitive job position—that of her law clerk. They also believed they had this power not only over Supreme Court Justices, who would need to seek reelection through the process they controlled, but also over other judges, like Judge Lopez Torres, who might someday want to be Supreme Court Justices. They thus leveraged their control over Supreme Court nominations into control over other, lower positions on the judicial employment ladder and over all the other jobs, like law clerk, dependent, in turn, on those positions. Although New York's judicial selection scheme genuflects at the altar of democracy, it prays to a very different god: patronage.

II. BECAUSE NEW YORK'S JUDICIAL NOMINATING CONVENTION IS UNIQUE, THE *LOPEZ TORRES* DECISION DOES NOT IMPLICATE OTHER STATE ELECTORAL STATUTES.

As noted in Part I above, New York's judicial nominating system fails to further either the accountability or the independence of the state trial court judiciary. It is no wonder that New York's system is unique. Given the singularity of the New York system, the Second Circuit *Lopez Torres* decision will have no applicability to the political nominating processes of other jurisdictions. Nonetheless, Petitioners attempt to depict the decision as one of "nationwide" impact and predict state-by-state statutory upheaval as a result. Cert. Pet. at 3. The 34 state convention statutes cited by Petitioners as the basis of this claim, however, are simply not comparable to New York's election law.

A. The New York Judicial Nominating System Is a Distinctive Statutory Scheme That, in Fact, Severely Burdens First Amendment Rights.

Although Petitioners attempt to characterize New York's

judicial nominating system as a creation of party rules and practice, it is actually a product of detailed statutory mandate. Indeed, New York election law severely limits the discretion of political parties, granting them little opportunity to design or operate a more flexible or democratic system of judicial nomination.

The first phase of the judicial nominating process is the primary election at which party members vote for judicial delegates. N.Y. ELEC. LAW §§ 6-106, -124. To appear on the primary ballot, an aspiring delegate is required by law to gather 500 valid signatures from party members residing in the assembly district in which the delegate is running. N.Y. ELEC. LAW §§ 6-136(2)(i), (3). The law further mandates that each assembly district be represented by a convention delegate – a requirement that cannot be waived by political parties. N.Y. ELEC. LAW § 6-124. The second phase of the nominating process is the mandatory convention, which is scheduled, by law, to occur shortly after the primary election. N.Y. ELEC. LAW §§ 6-106, -124, -158. Selection by convention is the exclusive route to gain party nomination, and individual parties may not establish alternate routes. The nominating process ends with the general election at which the justices are elected. N.Y. ELEC. LAW § 8-100(1)(c).

In their review of this "State-created" system, the courts below found that it "functioned in fact" to exclude qualified candidates who lacked party leadership backing and imposed "severe burdens" on voters' rights to associate and vote. Pet. App. 35, 40. Specifically, the courts enumerated several aspects of the statute that serve to unduly impede challenger candidates from competing in the nomination process, including:

1. The statutory requirement that each assembly district in a larger judicial district be represented by at least one delegate creates a geographic and logistical burden on

candidates wishing to recruit and run their own slate of delegates. *Id.* at 11-12, *citing* N.Y. ELEC. LAW § 6-124.

2. The statutory requirement that, within a span of 37 days, a potential delegate must gather 500 valid signatures makes it impossible, in fact, for challenger candidates without the backing of the party apparatus to run a slate of delegates successfully. *Id.* at 12-13, *citing* N.Y. ELEC. LAW §§ 6-134(4), -136(2)(i), (3).

3. The statutory prohibition on providing information on the ballot identifying the judicial candidate(s) whom each aspiring delegate supports further limits voters' ability to exercise their associational rights by electing delegates who support their preferred candidate. *Id.* at 13.

4. The absence of any other mechanism to gain party nomination, *e.g.* through petition, post-convention caucus, assembly or election, means there is no "safety valve" in the system to protect voters and candidates otherwise shut out of the process. *See, e.g.*, N.Y. ELEC. LAW § 6-106.

The lower courts found that the effect of this unique collection of statutory barriers was to impose severe burdens on the constitutional rights of candidates and voters, warranting invalidation of the law. *Id.* at 70-76.

B. The State Election Laws Cited by Petitioners Are Distinguishable from the Challenged New York Statute, and Thus Will Not Be Affected by the *Lopez Torres* Decision.

No state matches New York's "byzantine and onerous" judicial nominating system. Pet. App. 69. As the above description reveals, the New York system has three key characteristics: it is mandated by statute; it allows political parties very little autonomy to structure their nomination

process; and it excludes any candidates without party leadership backing. The convention systems in the 34 states cited by Petitioners rarely have any of these characteristics, much less the combination of all three. Over two-thirds of the 34 cited state election statutes do not even mandate the use of a convention to nominate candidates for public office. Even in those few states where state law mandates use of a nominating convention, the circumstances are very limited and the political parties enjoy broad discretion to determine the convention structure.

(i) Most State Statutes Do Not Mandate the Nomination of Candidates for Public Office by Convention.

Twenty-four of the 34 states cited by Petitioners do not even require political parties to use a convention to nominate candidates for public office.[4] Of these 24, seven of these state

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[4] Included in the category of the 24 "non-mandatory convention" states are several sub-categories:

The first sub-category consists of the seven states that provide for conventions only to select *party* officers or to conduct internal *party* business, *see infra* note 5.

The next sub-category is the 14 states that allow, but do not mandate, parties to use conventions for nominations for public office: ALA. CODE §§ 17-13-2, -50 (option of convention); ARIZ. REV. STAT. § 16-342 (option of convention to fill vacancies in certain circumstances); ARK. CODE ANN. § 7-7-104 (option of convention to fill vacancies); GA. CODE ANN. § 21-2-180 (convention is an option only for minor parties, *see* § 21-2-2(23)); KY. REV. STAT. ANN. § 118.325 (convention is an option only to fill vacancies); MD. CODE. ANN. § 5-701, -703.1 (granting only minor parties the authority to choose how to nominate candidates); N.M. STAT. ANN. §§ 1-8-1, -2 (convention is an option only for minor parties); OR. REV. STAT. § 248.009 (convention is an option only for minor parties); S.C. CODE ANN. §§ 7-9-70, 7-11-10, -30 (provides option of nominating by primary, convention or petition); TENN. CODE ANN. § 2-13-202, -203 (grants party authority to determine method of nomination for certain offices); UTAH CODE ANN. § 20A-9-404 (optional convention); VA. CODE

statutes provide for conventions only to nominate or select candidates for *party* office, or to conduct other internal *party* business.[5] Party conventions that have no connection to public elections are not relevant to the consideration of the New York judicial conventions. *See* Pet. App. 39

ANN. §§ 24.2-508, -509 (grants party authority to determine method of nomination); WASH. REV. CODE § 29A.20.121 (convention is an option only for minor parties); W. VA. CODE § 3-5-22 (convention is an option only for minor parties).

The next sub-category consists of the two states that allow a party to select by convention those candidates it wishes to endorse, but provide that the party nominee will ultimately be selected by primary election. COLO. REV. STAT. § 1-4-102; CONN. GEN. STAT. § 9-382. Unlike the New York judicial convention, which is the exclusive route to party nomination, these "endorsement" conventions are but one route by which a candidate can access the primary election ballot. In Colorado, a candidate can secure a place on the primary election ballot *either* by earning 30 percent of the votes at the party convention, *or* by meeting petitioning requirements. COLO. REV. STAT. §§ 1-4-102, -103. In Connecticut, a party may select its preferred candidate at a convention, but then that party-endorsed candidate must compete with all other eligible candidates in a primary election. CONN. GEN. STAT. § 9-415.

Finally, the Florida convention statute cited by Petitioners has been repealed. *See* FLA. STAT. ANN. §99.0965 (repealed by 2007 Fla. Sess. Law Serv. Ch. 2007-30 (C.S.H.B. 537), effective May 21, 2007).

[5] The party conventions in Delaware, Idaho, Illinois, Maine, Ohio, New Hampshire, and Rhode Island do not determine the nomination of candidates for public office, but are limited to *party* business. *See* DEL. CODE ANN. tit. 15, § 3113 (optional convention to nominate candidates for party offices and to formulate party platform); IDAHO CODE § 34-707 (mandatory conventions only for adoption of platform and election of party officers); 10 ILL. COMP. STAT. 5/7-9 (mandatory county and state conventions only for selection of party officers, adoption of platform, and selection of delegates to national nominating conventions); ME. REV. STAT. ANN. tit. 21-A, § 321 (mandatory convention only to nominate candidates for party offices, select presidential electors and formulate platform); N.H. REV. STAT. ANN. § 667:21 (mandatory convention only to formulate platform and nominate presidential electors); OHIO REV. CODE ANN. § 3513.11 (same); R.I. GEN. LAWS § 17-12-13 (same).

(recognizing that it is when the activities of political parties are an "integral part of the election machinery" that constitutional protections extend to party members); *United States v. Classic*, 313 U.S. 299, 318 (1941).

The remaining 17 states allow the use of conventions to nominate candidates for *public* office, but do not make such conventions mandatory. Some of these states provide political parties with a range of options for nominating candidates for public office. For instance, South Carolina provides that nominations "may be by political party primary, by political party convention or by petition." S.C. CODE ANN. § 7-9-70. The other states of this subgroup permit, but do not require, the use of conventions for limited or specific purposes, such as for filling vacancies in office or for minor party candidate nominations. New Mexico's election law, for example, requires major parties to nominate candidates by primary election, but allows minor parties to choose from various methods of nomination, including conventions. N.M. STAT. ANN. § 1-8-1. Because the use of conventions in these 17 states is by party choice, not statutory mandate, the systems are wholly distinguishable from New York's judicial nominating conventions.

(ii) Six States Mandate Nominating Conventions Only in Narrow Circumstances.

Four states – Texas, Kansas, North Carolina and Wyoming – require only minor or new parties to nominate their candidates for public office by conventions. TEX. ELEC. CODE ANN. § 181.003; KAN. STAT. ANN. § 25-202(b); N.C. GEN. STAT. § 163-98; WYO. STAT. ANN. §§ 22-4-303, -406. For instance, Texas law requires minor parties to nominate their candidates by convention, while simultaneously mandating primary elections for major party nominations. TEX. ELEC. CODE ANN. §§ 172.001, 181.003. Two states – Nebraska and North Dakota – require the use of conventions

only for the purpose of filling vacancies in public offices. N.D. CENT. CODE § 16.1-13-14; NEB. REV. STAT. § 32-721. It is important to note, however, that although these statutes require conventions in certain situations, they allow parties to determine all significant aspects of delegate selection and convention design.

Further, the use of conventions in these narrow circumstances imposes minimal burdens on the associational rights of the rank-and-file, and is justified by state interests that are not present in the New York context. Unlike a major party's convention, the small size of a minor party – and the corresponding scale of its convention – facilitates participation by party members, and makes it unlikely that party leaders can insulate themselves from the preferences of the majority.[6] The state also has a clear interest in avoiding the costs of conducting primary elections for parties with small memberships, and in preventing voter confusion by limiting the number of candidates who appear on the primary ballots. In the same vein, because vacancies are rare and unforeseeable, using a convention to fill a vacancy does not provide party leaders with any real opportunity to consolidate power over party nominations. Further, the state interest in expeditiously filling open offices and providing for continuity of representation is self-evident.

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[6] Because minor parties by definition have only received a small percentage of the electorate's votes, their nominee is unlikely to be the victor in the general election. The concern that party leaders, by controlling the nominating convention, effectively control the outcome of the general election is thus not pertinent. This situation stands in sharp contrast to New York judicial races, where *de facto* one-party rule by one of the major parties is common. Pet. App. 32 (noting that evidence showed that one-party rule is "the norm" and that in between 1990 and 2002, over half of the State's elections for Supreme Court Justice were uncontested); *see also supra* Section I.B.

(iii) Four States Require Conventions to Nominate Candidates for Certain Public Offices, but Grant Political Parties Broad Discretion to Structure the Process.

Only four states – Iowa, Indiana, Michigan, and South Dakota – require the use of a convention to nominate candidates for public offices. In contrast to New York, however, these four states' statutes reserve for the political parties significant decision-making authority over the design and operation of their delegate selection and convention processes. Consequently, these state systems involve less statutory intrusion into the associational rights of both the party organization and its members.

Iowa law requires that candidates for lieutenant governor be nominated at the parties' statewide conventions, but allows the conventions to be held *after* the gubernatorial primary election. IOWA CODE. ANN. §§ 43.123, .107. The use of a post-primary convention thus enables the nominee for Governor to be involved in the selection of the lieutenant governor, who will be his or her running mate in the general election. This specific justification for nominating by convention is, of course, not applicable to New York's judicial nominating convention. Further, in Iowa, the apportionment of delegates and other aspects of delegate selection, as well as the procedures of the convention, are left to the discretion of political parties and are not mandated by statute.

Although Indiana law requires all parties to use statewide conventions to nominate candidates for Lieutenant Governor, Secretary of State, Auditor of State, Treasurer of State, Attorney General, and Superintendent of Public Instruction, it allows the state committee of each party to determine the

procedure for nominations. *See* IND. CODE ANN. § 3-8-4-2; *see also* Ind. Repub. Party Rule 220.[7] Specifically, the statute allows the parties to determine whether the delegates are to be elected from districts or at large in each county, the number of districts, and the boundaries of such districts. IND. CODE ANN. §§ 3-8-4-3 to -5; 3-10-1-4(b)(2). *See also* Ind. Dem. Party Rule 17(a)(7) (governing apportionment of delegates across counties);[8] Ind. Repub. Party Rules 186, 187 (governing number of delegates per district, whether delegates elected by district or at-large and district boundaries).

Similarly, South Dakota law requires that major parties nominate candidates for certain public offices, including lieutenant governor, attorney general, secretary of state, state auditor and state treasurer. S.D. COD. LAW § 12-5-21. Again, however, the manner in which delegates are selected and the structure of the nomination process are matters of party choice, not statutory mandate as in New York. S.D. COD. LAW §§ 12-5-1 to -22. *See also* S. Dak. Repub. Rules, Section VIII, 1.A-C (providing that delegates to state convention are elected in primaries, or eligible by reason of office); S. Dak. Dem. Const., Art. IX, §§ 2, 4 (setting forth criteria for state convention delegates and procedure for selection).[9]

Michigan, the fourth and last state, requires that candidates for certain offices, including Lieutenant Governor, Attorney General, and Secretary of State, be nominated by

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[7] Available at http://www.indgop.org/rulesrevision06.pdf (last visited July 10, 2007).

[8] Available at http://www.perrycountydemocrats.com /pdfs/InDem-PartyRules.pdf (last visited July 10, 2007).

[9] Available at http://www.sddp.org/index.asp?Type=B_LIST&SEC={FC4EB604-9510-4EEB-9843-F41B511FE2AF} (last visited July 10, 2007).

party convention. MICH. COMP. LAWS CONST. art. 5, § 21; MICH. COMP. LAWS ANN. § 168.72. The state law, however, refrains from any significant intrusion into party autonomy. *See, e.g.*, MICH. COMP. LAWS ANN. § 168.620a (expressly providing that election statute will be preempted by party rule in the event of conflict at certain stages of the nomination process). Parties determine the apportionment of state convention delegates across jurisdictions and who votes at the convention. MICH. COMP. LAWS ANN. § 168.595, .598. Further, the burdens placed on the party rank-and-file members in New York are manifestly not present in Michigan: for instance, state Democratic Party rules allow *any* voter to vote at the party's statewide nominating convention. Mich. Dem. Party Rules, Art. 4B.

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In sum, a review of the 34 states cited by Petitioners reveals that *none* of their candidate nominating systems resemble the system operating in New York. Only four state statutes even mandate that major parties hold conventions to nominate candidates for public office at all. Petitioners' professed concern that the *Lopez Torres* decision will threaten election laws across the nation is unfounded.

Petitioners' concern also rests upon pure legal speculation. Even if another state's system more closely resembled New York's judicial nominating conventions, in practice it might not operate to "freeze out" challenger candidates or to deprive party members of associational and voting rights. The district court below applied strict scrutiny to New York's judicial nominating scheme only after it concluded, upon careful analysis, that "the electoral scheme function[ed] in fact" to severely burden the exercise of associational rights. Pet. App. 36. No court has performed any such analysis of the actual operation of the electoral statutes, for instance, in Iowa, Indiana, Michigan and South

Dakota. It is unfounded speculation, at best, to believe that any of these laws in fact impose excessive burdens on the constitutional rights of candidates and voters. It is therefore equally conjectural that these statutes may be impacted by the *Lopez Torres* decision.

III. THE SECOND CIRCUIT'S DECISION IS NOT A BLANKET BAN ON THE USE OF PARTY CONVENTIONS TO MAKE CANDIDATE NOMINATIONS.

In addition to the unfounded assertion that the *Lopez Torres* decision poses a threat to the convention statutes in existence in 34 states, Petitioners also advance the broader claim that the Second Circuit – and those parties that support its decision – in actuality oppose *any* nomination system that does not "proceed by primary or its functional equivalent." Cert. Reply, at 2; *see also* Petitioner Br. at 20 ("the Second Circuit's ruling would . . . requir[e] as a practical matter that all nominations proceed by primary").

Petitioners are attacking a straw man. Nowhere does the Second Circuit demand that every existing nominating convention system function exactly like a primary election. Instead, the Second Circuit simply held that the First Amendment "prohibits a state from maintaining an electoral scheme that in practice excludes candidates, and thus voters, from participating in the electoral process." Pet. App. 44. That is a far cry from the Petitioner's bald assertion that "no true convention system could be constitutional under the Second Circuit's extreme view of the First Amendment." Cert. Pet. at 15. The decision below properly leaves the Legislature free to devise a judicial selection system that is free from constitutional infirmities. There may well be a variety of potential statutory "fixes" that would allow New York to devise a system that serves the State's interests and still respects the constitutional rights of party members.

Petitioners appear to concede as much in their critique of the district court's choice of remedy. Petitioners argue that the court below should have issued a more tailored injunction, striking only those aspects of the law that burdened First Amendment rights, and leaving intact the basic convention structure. *See* Cert. Pet. at 17 (suggesting an injunction limited to, *e.g.*, "(1) reducing the number of petition signatures required; (2) decreasing the number of delegates; (3) extending the time period before the convention to give more time for candidates to lobby and delegates to deliberate"). Implicit in the Petitioners' proposed remedy, however, is their acknowledgment that the convention system could operate in a more democratic and accessible manner. Given the possibility for reforming the convention process to remedy First Amendment violations while retaining some of its fundamental structure, Petitioners cannot credibly maintain that the Second Circuit holding only allows nomination through primary elections.

IV. PETITIONERS' CONCERNS REGARDING POTENTIAL INCONSISTENCIES BETWEEN THE HOLDING IN *LOPEZ TORRES* AND THE PRESIDENTIAL NOMINATING SYSTEM ARE MISPLACED.

As the survey of the statutes of 34 states confirms, no other state nominating system even approximates New York's singular hybrid election-convention scheme. In apparent recognition of the weakness of their state-by-state argument, Petitioners spend much time speculating about potential tension between the *Lopez Torres* decision and the presidential nominating system. Petitioners Br. at 9-11; NY-AG Br. at 21-23. The crux of Petitioners' argument is that the presidential nominating convention – or at least its historical antecedents – would not likely pass muster under the construction given the First Amendment by the *Lopez Torres*

decision. This argument, however, rests upon two premises: that the presidential nominating convention is comparable to a state's individual nominating system such that the *Lopez Torres* decision would be applicable; and that the presidential system is yet more restrictive of party members' constitutional rights than the New York system. Neither is correct.

A. The Presidential Nominating System Is Not a Meaningful Point of Comparison.

The initial question raised by this line of argument is whether the *Lopez Torres* case – which analyzed a state's statutory regulation of its own "election machinery" – has any bearing on the constitutionality of the presidential nominating convention. This Court has recognized that the nomination of presidential candidates is unique, and implicates different state, party and individual interests. *Cousins v. Wigoda*, 419 U.S. 477, 489-91 (1975). The presidential nomination is wholly different from a nomination for state office, both because it is vast in scale, requiring the reconciliation of multiple "coalitions" within the party "cutting across state lines," and because the final decision is national in scope and effect. *Id.* at 490.

Petitioners also fail to realize that – unlike the New York judicial nominating convention – the presidential nominating system is not a creature of statute, but instead structured principally through party rule and practice. *Democratic Party of U.S. v. LaFollette*, 450 U.S. 107, 123 (1981). For instance, political parties determine the apportionment of delegates to the various states, the composition of each state's delegation and the qualifications of primary voters. *See, e.g.*, Republican National Committee Rules 13, 14, 15.[10] Further, as entities

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[10] Available at http://www.gop.com/About/AboutRead.aspx?AboutType=4 (last visited July 9, 2007).

with associational rights, political parties enjoy greater latitude than do states to regulate their nomination processes. Requirements that are lawful if imposed by party rule or regulation may be unconstitutional if mandated by statute. *See, e.g., Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987) (upholding rule of Democratic National Party requiring equal representation of the sexes in state delegations to the national convention).[11] That national political parties allow certain procedures in the presidential nominating process does not necessarily mean that a state can mandate similar ones in the state nominating process. Petitioners' attempt to justify New York's *statutory* convention scheme by pointing to national conventions governed by *party rule and practice* is thus unfounded.

B. Compared to the New York System, the Presidential Nominating Convention Is More Open to Party Member Participation, and More Conducive to Associational Activity.

Because the presidential system has no connection to state nomination systems, it is irrelevant to deciding whether the decision of the Second Circuit is correct. If this Court were to review the presidential nominating system, however, it would find that the current system, in practice, surpasses the New York judicial nominating system in its acceptance of the participation of rank-and-file members and its deference to their choices.

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[11] Indeed, where in conflict, a national party rule trumps a state statute in the context of the presidential nominating process. In *Cousins*, 419 U.S. at 489-90, this Court held that the Democratic Party could exclude a slate of delegates selected pursuant to Illinois state law because its composition violated certain national party guidelines. *See also LaFollette*, 450 U.S. at 123-24 (upholding Democratic National Party refusal to seat Wisconsin's presidential delegation because it was elected in an *open* presidential primary in contravention of national party rule).

Before beginning an analysis of the current presidential system, *amici* note as a threshold matter that Petitioners' focus on *past* presidential nominating conventions is inapt. *See, e.g.*, Petitioners' Br. at 9-11. The history of presidential nominating conventions is irrelevant to the constitutionality of the present New York system or the validity of the *Lopez Torres* decision. Even if we assume the accuracy of Petitioners' description of past systems, Petitioners make no mention of judicial authority upholding the historic convention practices that they so enthusiastically detail. Unless a court of law considered and upheld past convention systems, their mere existence does not speak to their legality.

The modern presidential nomination process consists of two stages: (1) the pre-nomination phase, in which delegates to the national party conventions are elected in either state primary elections or caucuses; and (2) the national convention, in which the delegates nominate the party's candidates for President and Vice President. Because the great majority of delegates selected in the first stage are pledged to a particular candidate, the convention in the second stage does little more than ratify the earlier choices of the voters of the individual states. ANDREW E. BUSCH, OUTSIDERS AND OPENNESS IN THE PRESIDENTIAL NOMINATING SYSTEM 15 (1997) (stating that the lack of delegate discretion meant that the outcome of no presidential nominating convention has been in doubt since the 1976 Republican nomination campaign).

The locus for party member participation is thus the first stage, in the primaries and caucuses of the individual states. The vast majority of states allow voters to elect in primary elections delegates who are pledged to a particular candidate; party members thus can directly express their preference as to their party's nominee. In the 2000 elections, for instance, 85.2% of Democratic delegates (in 38 states and the District of Columbia) and 90.1% of Republican delegates (in 41 states

and the District of Columbia) were scheduled to be selected in states holding primaries. *See* CONGRESSIONAL RESEARCH SERVICE, PRESIDENTIAL ELECTIONS IN THE UNITED STATES: A PRIMER (April 17, 2000) 7 ("CRS RPT."). The remaining states use a caucus or convention process to elect delegates to the national convention. *Id.* at 10. Although there is considerable variation in state party rules, the caucus process in most states has the same multi-tiered structure. NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES, 2000, S. DOC. NO. 106-16, at 145 (2000) ("2000 PRES. ELECTION"). It typically begins with a local precinct caucus where the rank-and-file members select delegates who will represent their preference of presidential candidate at the county caucus or convention. *Id.*; *see also* CRS RPT. at 10-11.[12] The county convention delegates in turn select delegates for the state convention, who in turn select the presidential convention delegates according to party rules. CRS RPT. at 10-11. Thus, the preferences of the party rank-and-file are communicated up the party hierarchy.

The key distinction between the presidential nominating caucus and the New York judicial convention is thus the "pledged" delegate. The presidential system generally allows rank-and-file party members to express their preferences by selecting delegates who are committed by law or practice to vote for a certain candidate.[13] The New York system in

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[12] At the precinct-level caucus, the practice typically is to divide attendees into groups based on the candidate they support. Each "candidate support group" then receives delegates in proportion to its percentage of the attendees at the larger caucus meeting. *See* AMERICAN PRESIDENTIAL ELECTIONS: PROCESS, POLICY AND POLITICAL CHANGE 17 (Harvey L. Schantz, ed., 1996). The "process of discussion, allocation and selection of delegates" then is repeated at county and state caucus levels. *Id.*

[13] Democratic National Committee rules expressly require that the delegates selected in primaries or caucuses declare their presidential preference or state that their status is uncommitted. *See* Democratic Party

contrast, silences members by requiring that they vote in "blind primaries" for independent delegates. Thus, the use of presidential nominating caucuses in certain states does not, as Petitioners suggest, cast doubt on the relative openness of the presidential nominating system. *See, e.g.*, NY-AG Br. at 22. Petitioners are missing the point: not all conventions are created equal. In the 1980 presidential convention, for instance, only 3.5% of the 3,331 Democratic delegates and only 5% of the 1,994 Republican delegates were uncommitted.[14] LEON D. EPSTEIN, POLITICAL PARTIES IN THE AMERICAN MOLD 97 (1986). By contrast, in *every* New York judicial nominating convention, *all* of the delegates remained uncommitted. It is therefore extraordinary to maintain, as Petitioners do, that the presidential system is the equivalent of the New York system, or that the putative constitutionality of the former somehow buttresses the legitimacy of the latter.

CONCLUSION

For all these reasons, *amici* respectfully urge the Court to affirm the Second Circuit judgment below.

Delegate Selection Rules 11, 12, *printed in* 2000 PRES. ELECTION at 167-70 (requiring all candidates for delegate to declare presidential preference or uncommitted status). In contrast, the Republican Party does not mandate by national rule a declaration of preference, and consequently, its delegate selection process is "less uniform and more dependent on different state party approaches." CRS RPT. at 11.

[14] Following the 1980 presidential election, the Democratic Party passed a rule creating a new category of "superdelegates" at the convention, comprised of party and public officeholders at the federal and state level, who had the option of remaining uncommitted to any candidate. ROBERT E. DICLERICO & JAMES W. DAVIS, CHOOSING OUR CHOICES: DEBATING THE PRESIDENTIAL NOMINATING PROCESS 19-20 (2002). The rule, however, set the number of superdelegates at no more than 14% of all convention delegates, and in practice, only a small percentage of delegates – for example, only 5% of the total delegates at the 1984 convention – chose to remain "unpledged." EPSTEIN, at 98.

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APPENDIX A

Thomas Mann and Norman Ornstein are political scientists at the Brookings Institution and the American Enterprise Institute, respectively. In their 38-year careers, they have individually and jointly written extensively about Congress, elections, redistricting, and American politics and government generally. Active in congressional, election, campaign finance, and other institutional reform efforts, their professional lives have been focused on the health and vibrancy of American political institutions. Their biennial book Vital Statistics on Congress is in its twelfth edition. Their latest book, The Broken Branch, was published by Oxford University Press in June 2006. Their joint AEI/Brookings efforts have included the Renewing Congress Project, Five Ideas for Practical Campaign Reform, the Transition to Governing Project, the Alternatives to the Independent Counsel Project, the Continuity of Government Commission, and the Election Reform Project. Mann is co-editor of Party Lines: Competition, Partisanship, and Congressional Redistricting, recently published by Brookings.

The Reform Institute is a not-for-profit 501(c)(3) educational organization, representing a unique, independent voice working to strengthen the foundations of our democracy. The Institute champions the national interest by formulating and advocating meaningful reform in vital areas of public policy, including campaign finance and election reform, energy independence and climate stewardship, homeland and national security, economic opportunity, and immigration reform. Former Congressman Charles Bass (R-NH) serves as Chair of the Board. The Reform Institute's campaign and election reform agenda has three main roles: (1) to reduce political corruption and the appearance of corruption; (2) to promote discussion about how best to reform election registration and voting procedures in order to increase transparency, competition, and meaningful citizen

participation in the democratic system; and (3) to promote and defend citizen reform initiatives that seek to open the doors of the voting process. The present case concerns whether a state can require a political party to run a judicial nomination process so as to effectively deny party voters any voice. It directly implicates the Reform Institute's second role of increasing meaningful citizen participation in the democratic system.

The Campaign Legal Center, Inc. ("CLC") is a nonpartisan, nonprofit organization that works in the areas of campaign finance, election law, and governmental ethics. CLC represents the public interest in administrative and legal proceedings where the nation's campaign finance and election laws are enforced: at the Federal Election Commission (FEC), the Internal Revenue Service (IRS), and in federal and state courts. In the campaign finance area, CLC generates legal and policy debates about disclosure, political advertising, contribution limits, enforcement issues, and many other matters. CLC also works to reform and enforce federal and state law in the areas of government ethics, lobbying disclosure and electoral reform, and currently leads a coalition of ten government watchdog groups working to improve these areas. The CLC has provided legal counsel to parties and *amici* in numerous cases on the subject of electoral integrity, including representing intervening defendants in the landmark campaign finance cases, *McConnell v. FEC*, 540 U.S. 93 (2003), and *FEC v. Wisconsin Right to Life*, 551 U.S. ___ (June 25, 2007). The Campaign Legal Center has also participated as *amicus curiae* in various cases addressing judicial and government integrity, such as *Valdes v. United States*, No. 01 CR 00154-010020 (D.C. Cir. Feb. 9, 2007) and *Avery v. State Farm Mutual Automobile Insurance Company*, 547 U.S. 1003 (2006).